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No. _____

In The

Supreme Court of the United States

October Term, 1994

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida,

Cross-Petitioner,

v.

JOHN O. ZIPPERER, JR., an individual,

Cross-Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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83pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Tax Injunction Act, 28 U.S.C. Section 1341 bar federal court jurisdiction in an action by a mortgagee challenging the priority of a special assessment lien where, under the Florida Constitution, the special assessment is not considered a tax and where Florida law nonetheless provides the mortgagee plain, speedy and efficient remedies to challenge the priority?

a. Whether a Chapter 170 assessment can be challenged through plain, speedy and efficient remedies in state court?

2. Whether subject matter jurisdiction is exclusively in state court?

LIST OF PARTIES

The parties to the proceedings are:

Cross-Respondent:

JOHN O. ZIPPERER, JR.

Cross-Petitioner:

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; and other named parties in the case below are: FORT MYERS CITY COUNCIL, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT DISTRICT.[1]

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[1] Although not a named party, the State of Florida filed amicus curiae brief in support of the Cross-Petitioner's position in both the Court of Appeals and District court below and has been served with this Petition.

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Cross-Petitioner adopts herein, in its entirety, Petitioner/Cross-Respondent, JOHN O. ZIPPERER's APPENDIX, A through E, (hereinafter referred to as P.App.).

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CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Judgment and opinion of the Court of Appeals for the Eleventh Circuit for which review is sought is reported as *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) and is reprinted in the Cross-Respondent's Appendix. (P.App. A.).

STATEMENT OF JURISDICTION

Judgment was rendered by the Court of Appeals for the Eleventh Circuit on January 3, 1995 and rehearing was denied on February 10, 1995. On March 8, 1995, the Court of Appeals granted Cross-Respondent's Motion for Stay of the Mandate until May 8, 1995.

The Petition for Writ of Certiorari was received by the Respondent, City of Fort Myers on May 8, 1995. Respondent files this Cross-Petition pursuant to Rules 10.1(a), 12.3 and 13.5 of the Rules of the United States Supreme Court.

This Court's jurisdiction to review a judgment and opinion of the United States Court of Appeals for the Eleventh Circuit is invoked pursuant to 28 U.S.C. Section 1254(1). The petition was filed within 90 days of the entry of the Eleventh Circuit's order denying Cross-Respondent's Motion for Rehearing in accordance with 28 U.S.C. Section 2101(c) and U.S. Supreme Court Rule 13.4.

The Tax Injunction Act (28 U.S.C. Section 1341) bars federal court jurisdiction of this action because, contrary to reasons cited in the Eleventh Circuit's Opinion, the

Cross-Respondent has Plain, Speedy and Efficient remedies available in the Florida courts and because the petitioner seeks to "enjoin, suspend or restrain" the collection of a tax.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Florida Statutes, Chapter 170 (1993) is reproduced in its entirety in the Cross-Respondent's Appendix. (P.App. E).

28 U.S.C. Section 1341 provides:

> The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the Courts in such state.

Florida Statutes, Chapter 173 is reproduced in its entirety in the Cross-Petitioner's Appendix.

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[2] The City filed a Petition for Rehearing (P. App. D) arguing that the federal courts did *not* have jurisdiction of Mr. Zipperer's suit and citing for example, *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975).

ARGUMENT

INTRODUCTION

Removing the ban of the Tax Injunction Act will *encourage federal court litigation to avoid* paying special assessment taxes through protracted *debtor* defense tactics. This will have the effect of flooding the federal courts with avoidance suits and have a tremendously detrimental effect on the ability of *local governments* to collect these *taxes. This is precisely the evil which the Tax Injunction Act was designed to prohibit.*

The use of special assessments to construct needed infrastructure improvements has greatly increased in the State of Florida, averaging around two percent (2%) to three percent (3%) of all revenues collected.[3]

It has been shown that Florida has employed the use of special assessments increasingly as a means of providing necessary infrastructure:

> The use of non-ad valorem special assessments to fund systems, facilities, services, works, and improvements to real property is increasing in Florida counties, unlike in the rest of the country. The number of Florida counties levying special assessments has increased from thirty-one counties in 1985 to forty-nine in 1990. The use of special assessments by municipalities in Florida also has increased, from ninety-six in 1985 to 116 in 1990. The Florida Advisory Council on Intergovernmental Relations (ACIR), for

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[3] van Assenderp and Solis, *Dispelling the Myth: Florida's Non-Ad Valorem Special Assessments Law*, 20 FLA. ST. U.L.REV., 823 (1993).

example, relying on a survey conducted by the Florida Comptroller's office, found that local governments collected $349,277,277 in revenue by levying special assessments in fiscal year 1989-90. This constituted an increase of $183,362,633 from 1985-86. The Comptroller's survey found:

- Florida counties accounted for $232,325,368 or 66.52% of the 1989-90 total.

- Special districts accounted for $76,823,359 in 1989-90 or 21.99% of all special assessment revenues, down from 34.58% in 1985-86.

- Florida municipalities accounted for $40,129,050 of special assessment revenues (11.49% in 1989-90).

Although the use of special assessments by Florida municipalities and special districts as a percentage of the total use of such assessments by all local governments from 1985-1986 to 1989-90 has decreased, the actual numerical amounts have increased significantly. By comparison, the use of ad valorem taxes by the same types of local governments as a source of revenue has increased proportionally; therefore, the percentage of total revenues has remained approximately the same.[4]

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[4] *Op. Cit* at pp. 835-836.

I.

CHAPTER 170 ASSESSMENTS ARE TAXES FOR PURPOSES OF THE TAX INJUNCTION ACT

In its analysis of the Tax Injunction Act to the facts of the *Zipperer* case, the Eleventh Circuit did not expressly state whether, in its opinion, a Chapter 170 assessment is a tax under federal law. It has previously held, however, that a special assessment, similar to a *Florida Statutes*, Chapter 170 assessment, is a tax under federal law in *Williams v. City of Dothan, Alabama*, 745 F.2d 1406 (11th Cir. 1984). *However, in the instant case, the Court characterized the central issue as whether an adequate remedy to contest this tax existed under state law for Mr. Zipperer because he was a mortgagee.*

Any interpretation *that states that special assessments are not taxes under federal law* is squarely in opposition to *Tramel v. Schrader, Id.*, where the Court stated:

> . . . special assessments are taxes, and one District Court has so held when considering the issue in the context of the Tax Injunction Statute. At Page 1314.

In *Tramel v. Schrader*, 505 F.2d 1310 (1975 CA5 Tex), a suit was filed in federal court to enjoin the collection of special street improvement assessments by city officials. The court held the action to be barred by 28 U.S.C. Section 1341, rejecting the plaintiff's contention that Section 1341 was inapplicable because a special assessment was not a "tax."

The Cross-Petitioner City contends that this is an action to enjoin a tax because a challenge to the

imposition of the special assessment is tantamount to a request to enjoin enforcement of the lien. *Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817 (7th Cir. 1978).

It has been repeatedly held that special assessments must be considered a "tax under state law" within the meaning of the Tax Injunction Act so that the prohibition against federal jurisdiction applies. See, *Tramel, supra; Burris v. City of Little Rock*, 941 F.2d 717 (8th Cir. 1991); *Chicago, F.T.P., M. and O.RY, Co. v. City of Randolph*, 122 F.Supp. 302 (D. Neb. 1954); *Lake Lansing Special Assessment Protest Association v. Ingham County Board of County Commissioners*, 488 F.Supp. 767 (S.D. Mich. 1980). *Soo Line Railroad Co. v. City of Harvey*, 424 F.Supp. 329 (N.D. 1976); *Indiana Waste Systems, Inc. v. County of Porter*, 787 F.Supp. 859 (N.D. Ind. 1992); *Kimmey v. H.A. Berkheimer, Inc.*, 376 F.Supp. 49 (E.D. P.A. 1974).

Under *Winicki v. Mallard*, 783 F.2d 1567 (11th Cir. 1986), Cross-Respondent has the burden of demonstrating that he has no adequate state remedy. Cross-Respondent has not even alleged a lack of plain, speedy and adequate state remedy.

In *Robinson Protective Alarm Co., v. City of Philadelphia*, 581 F.2d 371 (3rd Cir. 1978), the defendant city's code regulating the construction and use of underground wires beneath the city's streets provided that private alarm signal system licensees were required to pay a percentage of their gross earnings to the city for use of the underground wires. The *Robinson*, court held that the amounts payable pursuant to the city code were "tax(es) under State law" within the scope of 28 U.S.C. Section 1341, notwithstanding a State Supreme Court characterization

of the nature of similar payments made under a predecessor city code as neither a tax nor a license fee, but an annual rental to be paid for the privilege of the use of space under the streets.

The Act applies to any "tax". *Schneider Transport*, 657 F.2d at 132, a definition which must be determined as a matter of federal law by reference to the congressional policies underlying the Act, rather than by the state label affixed to the tax. *Robinson, supra; Tramel, supra* (the proper question is not what the state courts have said the State Legislature meant when it used a particular term but rather what Congress meant when it used the term "tax".)[5] The Act applies to both municipal and local taxes as well as to state taxes. *Kimmey, supra.*

In *City of Randolph*, the court, in holding that the special assessment constituted a tax and thus the federal court did not have jurisdiction over the action, stated, "broadly speaking, special assessments for benefits are part of the system of taxation, often being referred to as method or species of taxation. The levy of such an assessment is an exercise of, and referable to, the taxing power, and an attribute of sovereignty . . . " *Id. See also Lake Lansing, supra* (the term "tax" as used in the Act includes special assessments levied by municipal corporations); *Tramel, supra* (special assessment constitute a tax within

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[5] Because the determination of what constitutes a tax under the Act is made by reference to federal law, the case of *City of Boca Raton, supra* is not controlling. Moreover, because the Florida Supreme Court's determination in *City of Boca Raton, supra* was not in the context of the Act, its holding is inapplicable to the instant case.

the purview of the Act, requiring dismissal of suit by landowners to enjoin collection of such assessments by city officials); *Burris, supra* (cases which dispute special assessments involve state taxes and the Act thus forbids federal courts from exercising jurisdiction over such cases); *Soo Line, supra* (special assessment levy by municipal corporation against railroad was a tax within the meaning of the Act); *Indiana Waste, supra* (special assessment by municipality constitutes a tax within the meaning of the Act). In passing the Act, Congress was motivated largely by concerns of comity. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 179, 70 L. Ed. 2d 271 (1981). The Act, and the United States Supreme Court decisions which preceded it, reflect the "fundamental principal of comity between federal courts and state governments that is essential to 'Our Federalism'," particularly in the area of state taxation. 454 U.S. at 103, 102 S. Ct. at 179. The Act creates an absolute jurisdictional bar to federal involvement in state and local revenue collection schemes. *Keleher v. New England Telephone and Telegraphic Company*, 947 F.2d 547, 548 (2d Cir. 1991). If the Act applies, a federal Court is without jurisdiction to hear the case. *See Hardwick v. Cuomo*, 891 F.2d at 1102. In most circumstances, the Act prohibits federal district courts from issuing injunctions or granting declaratory relief from the collection of state taxes. *Raskauskas v. Town of Bethany Beach*, 555 F. Supp. 783, 786-787 (D. Del. 1983).

The relief sought by Cross-Respondent would clearly halt the collection of special assessments authorized under Florida law and required under the bond instrument. In other words, the Cross-Respondent seeks to

enjoin the City from taking action to collect special assessments unpaid under Florida law.

II.

PETITIONER/CROSS-RESPONDENT HAS PLAIN, SPEEDY AND EFFICIENT REMEDIES TO CONTEST CHAPTER 170 SPECIAL ASSESSMENTS IN STATE COURT

In the instant case, Mr. Zipperer has failed to even allege the lack of a plain, speedy and adequate state remedy. In point of fact, a foreclosure action is currently pending against the Cross-Respondent's liened property in an *in rem* action in state court to which defenses have been made. This action was filed by the City of Fort Myers and a certified copy of the Complaint in that action is attached hereto as Appendix "1". Mr. Zipperer has responded, attacking the validity of the assessment lien. (Appendix "2").

Although *Colonial Pipeline v. Collins*, 921 F.2d 1237, 1245-46 (11th Cir. 1991), held that the Plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction, the Court also held that "so long as a complainant has some opportunity to raise his constitutional objections the state remedy need not be the best remedy available or even equal to or better than the remedy which might be available in federal court." *Id.* At Page 1245. The Court in *Colonial Pipeline, supra* had before it a claim that the Georgia courts will not entertain jurisdiction in a suit brought under 42 U.S.C. Section 1983, founded only on an assertion that an ad valorem tax

assessment is unequal. The Florida courts have no such limitation nor is this the claim made by the Plaintiff.

It should be noted that the plaintiff in *Colonial Pipeline, supra,* alleged sufficient facts to support its claim that Georgia failed to provide an adequate remedy and survived a Motion to Dismiss for Lack of Subject Matter Jurisdiction. In the instant case, however, the Plaintiff has alleged nothing on this issue.

Cross-Respondent has, at least the following remedies available to him in state court in Florida:

1. An action to quiet title to *subordinate* the City's lien;
2. Declaratory Relief in State Court pursuant to *Florida Statutes,* Section 86.011.
3. *A challenge to* foreclosure of the City's special assessment lien;
4. The right to reopen its foreclosure suit in State Court to join the City of Fort Myers and attempt to challenge the priority of the City's lien in State Court;
5. A breach of contract action against the developer based upon the Mortgage Agreement;
6. A 42 U.S.C. Section 1983 challenge to the administration of the special assessment in state court.

If all else fails, Injunctive Relief is also available in State Court.

A state court remedy is a "plain, speedy and efficient remedy" if it provides the taxpayer with a full hearing

and judicial determination at which any and all constitutional objections to the tax may be raised. *Roswell v. La Salle Nat'l Bank*, 450 U.S. 503, 512-15, 101 S. Ct. 1221, 1228-30, 67 L. Ed. 2d 464 (1981). Federal courts considering the issue have held that Florida State court remedies meet these requirements. The 11th Circuit had previously found the Florida tax remedies to be plain, adequate and complete as required by the Act. *Id.* at 1233, *citing Winicki v. Mallard*, 783 F.2d 1567, 1570 (11th Cir.) *cert. denied*, 479 U.S. 815, 107 S. Ct. 70, 93 L. Ed. 2d 27 (1986) (a review of available state remedies demonstrates that Cross-Respondent has a choice of remedies under Florida law which are plain, adequate and complete). *See also, Daytona Beach Rac. & Rec. Fac. Dist. v. City of Volusia*, 579 F.2d 367 (5th Cir. 1978) (Florida provided a plain, speedy, and efficient remedy in state court as to invoke bar of the Act). The relief sought in Federal Court is available to the Cross-Respondent in state court. Accordingly, it must be concluded that the Tax Injunction Act prohibits this Court from exercising jurisdiction over the instant action notwithstanding the fact that Cross-Respondent has based his complaint on alleged violations of his civil rights pursuant to 42 U.S.C. Section 1983.

Of course, even if *Cross-Respondent* were not regarded as *a taxpayer* under state law and even if the cited tax remedies were not available, Cross-Respondent still would have plain, speedy, and efficient remedies available to him. Section 86.011, *Florida Statutes*, is erroneously cited by the Eleventh Circuit as a tax remedy. In fact, this is a general declaratory judgment statute and it regularly has been employed to challenge special assessments. See

Mlecka v. Citrus County, 610 So.2d 677 (Fla. 5th DCA 1992).

The Eleventh Circuit did not consider that Cross-Respondent could have brought his 42 U.S.C. Section 1983 action in state court. See *Tucker v. Resha*, 19 Fla. L.W. S570 (1994); *Howlett v. Rose*, 571 So.2d 29 (Fla. 2d DCA 1990); *Brooks v. Elliott*, 593 So.2d 1209 (Fla. 5th DCA 1992). In fact, in *Fair Assessment, supra*, this Court stated that a plain remedy exists under the Act when a Section 1983 action can be brought in state court. In so doing, the *Zipperer* Court, *supra*, failed to examine the totality of the remedies available to Cross-Respondent in state court – something that a previous panel of the Eleventh Circuit held that it is required to do. *Colonial Pipeline, supra*.

III.

SUBJECT MATTER JURISDICTION IS EXCLUSIVELY IN STATE COURT PURSUANT TO 28 U.S.C. SECTION 1341

The Tax Injunction Act, 28 U.S.C. Section 1341, forbids federal courts from exercising jurisdiction over claims involving state taxation. The statute provides, in full, as follows: "The District Courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state remedy is not "plain,

speedy, and efficient." *Roswell v. LaSalle National Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981). In *Osceola v. Florida Department of Revenue*, 893 F.2d 1231 (11th Cir. 1990), the Eleventh Circuit specifically found that Florida does provide a "plain, speedy, and efficient remedy" for challenging the validity of a tax so as to make the Tax Injunction Act applicable. See also, *Winicki, supra*, where the Court held the Tax Injunction Act, even if applicable to repeal Florida's homestead tax exemption statute, barred a federal civil rights challenge to the statute where taxpayers had plain, adequate and complete remedy under state law.

It has been repeatedly held that special assessments must be considered a "tax under state law" within the meaning of the Tax Injunction Act so that the prohibition against federal jurisdiction applies. See, *Tramel, supra; Burris, supra; Chicago, supra; Lake Lansing, supra.*

The Tax Injunction Statute prohibits the District Courts from enjoining, suspending or restraining the assessment, levy or collection of any "tax" where a plain, speedy and efficient remedy can be had in State Court. Under *Winicki, supra*, Cross-Respondent as Plaintiff has the burden of demonstrating that he has no adequate state remedy. Cross-Respondent has not even alleged a lack of plain, speedy and adequate state remedy.

It must also be recognized that the prohibition contained in Section 1341 extends to actions filed pursuant to 42 U.S.C. Section 1983 for alleged violations of civil rights. *Fair Assessment, supra; Burris, supra; Huber Pontiac, supra; Winicki, supra; Czajkowski v. State of Illinois*, 460 F.Supp. 1265 (N.D. Ill. 1977). Otherwise stated, where

jurisdiction over a Section 1983 action conflicts with the Tax Injunction Act, the latter controls. *Id.; Berry v. Alameda Board of Supervisors,* 753 F.Supp. 1508 (N.D. Cal. 1990).

Because Section 1341 acts as a restraint on the Court itself, the parties to an action cannot waive the jurisdictional bar of the statute to allow suit in federal court. *Hardwick, supra; City of Houston v. Standard-Triumph Motor Co., Inc.,* 347 F.2d 194 (5th Cir. 1965). The Act bars federal law suits seeking to enjoin a state tax, as well as federal law suits seeking declaratory relief regarding state taxes. *Osceola, supra; California v. Grace Brethren Church,* 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982); *Winicki, supra; Hardwick, supra.*

The Act, and the United States Supreme Court decisions which preceded it, reflect the "fundamental principal of comity between federal courts and state governments that is essential to 'Our Federalism'," particularly in the area of state taxation. *Fair Assessment, supra* at 103. The Act creates an absolute jurisdictional bar to federal involvement in state and local revenue collection schemes. *Keleher, supra.* If the Act applies, a federal Court is without jurisdiction to hear the case. *See Hardwick, supra.* In most circumstances, the Act prohibits federal district courts from issuing injunctions or granting declaratory relief from the collection of state taxes. *Raskauskas, supra.*

It should be noted that in a case analogous to the instant case, *Federal Deposit Insurance Corporation v. City of New Iberia,* 921 F.2d 610 (5th Cir. 1991), *the progenitor Circuit Court of Appeal held that* the only reason why the Tax Injunction Act did not apply was because the Federal

Deposit Insurance Corporation was a federal agency. *New Iberia involved facts remarkably similar to the instance case.* Federal agencies are exempt from the operation of Section 1341. The *New Iberia* court stated:

> Although the district court satisfied itself as to jurisdiction and the parties have not since raised the issue, it is worthwhile to explain why this case is not barred by the Tax Anti-Injunction Statute, 28 U.S.C. Section 1341. Section 1341 deprives federal courts of jurisdiction to enjoin, suspend or restrain the assessment, levy or collection of any tax under state law except where no plain, speedy and efficient remedy is available in state courts. While the goal of the statute is to reinforce federalism and comity with the states in matters of local taxation, that goal is not subserved when the local authorities have attempted to tax an instrumentality of the federal government. Consequently, the Supreme Court has concluded,
>
> > in accordance with an unbroken line of authority and convincing evidence of legislative purpose that Section 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction. At Page 613.

Allegations of deprivations of constitutional rights do not render the Act inapplicable. *Schneider, supra; Huber Pontiac, supra; Mandel v. Hutchinson,* 494 F.2d 364 (9th Cir. 1974. The Act applies to actions brought in Federal Court under 42 U.S.C. Section 1983, and bars the federal court's jurisdiction of Section 1983 matters which implicate the Act. *Werch v. City of Berlin,* 673 F.2d 192, 194 (7th Cir.

1982); *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986). "Basing a complaint upon alleged violations of civil rights, 28 U.S.C. Section 1343(3) and 42 U.S.C. Section 1983 or of the federal constitution will not avoid the prohibition contained in Section 1341." *Hickmann v. Wujick*, 488 F.2d 875, 876 (2d Cir. 1973). Thus, a civil rights action under Section 1983 does not constitute an exception to the specific jurisdictional bar expressed by the Act, which broadly limits federal court interference with state collection of taxes. *Brooks v. Nance, supra. See also, Fair Assessment, supra.* (the jurisdictional bar of Section 1341 extends to and includes Section 1983 actions.) A multitude of federal courts have dismissed actions, similar to the instant one, which allege Section 1983 violations for deprivation of due process and equal protection rights, because the federal district courts lacked jurisdiction over the cases by virtue of the Act. *See Werch, supra* (the Act barred Section 1983 complaint alleging that a municipality and its officials denied taxpayer equal protection of the laws by levying personal property taxes when other similarly situated residents were not so taxed, as the action involved the collection of a tax under state law and a plain, speedy, and efficient remedy could be had in state court); *Burris, supra* (Section 1983 action challenging a special assessment on due process and equal protection grounds barred by the Act); *Schneider, supra* (Section 1983 action for violation of due process barred); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428 (2d Cir. 1989) (Section 1983 action for violation of due process and equal protection rights barred); *Sacks Bros. Loan Co., Inc. v. Cunningham*, 578 F.2d 172 (7th Cir. 1978) (equal protection claim brought under Section 1983

barred); *Mandel, supra* (due process and equal protection violations brought under Section 1983 barred); *Czajkowski, supra* (equal protection and due process allegations brought under Section 1983 barred); *Hardwick, supra* (due process and equal protection challenges barred in a Section 1983 civil rights action). Thus, the fact that Cross-Respondent challenges the special assessment on constitutional grounds does exempt this action from the jurisdictional bar of the Act.

Accordingly, it must be concluded that the Tax Injunction Act contained in 28 U.S.C. Section 1341 prohibits the federal courts from exercising jurisdiction over the instant action notwithstanding the fact that Cross-Respondent has based his complaint on alleged violations of his civil rights.

CONCLUSION

Subject matter jurisdiction is exclusively in state court because of the limitations of 28 U.S.C. Section 1341, the Tax Injunction Act. Under federal law, special assessments are taxes for purposes of the Tax Injunction Act. Additionally, Florida special assessments are taxes by virtue of federal definitions and judicial precedent. Cross-Respondent has adequate state remedies to contest his opposition to the imposition, force and effect of any special assessment lien in state court.

Respectfully submitted,

JACQUELINE WILLIAMS HUBBARD, Esq.
City Attorney, City of Fort Myers
Post Office Drawer 2217
Fort Myers, Florida 33902
Attorney for Cross-Petitioner
City of Fort Myers
(941) 332-6707
(941) 332-6127 (FAX)

APPENDIX

Cross-Petitioner adopts herein, in its entirety, Petitioner/Cross-Respondent, JOHN O. ZIPPERER's APPENDIX, A through E, (hereinafter referred to as P.App.).

APPENDIX 1 – The state foreclosure Complaint . . . App. 1

APPENDIX 2 – Mr. Zipperer's answer and affirmative defenses to the foreclosure of the lien. . . . . App. 18

APPENDIX 1

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

CITY OF FORT MYERS, a Florida municipal corporation,

Plaintiff,

vs. CASE NO. 93-7236 CA IA

Certain Land upon which special Assessments, Districts 10, 15 and 17 Assessments are Delinquent,

Defendants.

_____/

AMENDED BILL OF COMPLAINT FOR FORECLOSURE (IN REM)

(Filed Oct. 15, 1993)

Plaintiff, City of Fort Myers (hereinafter referred to as "City"), a Florida municipal corporation, by and through its undersigned counsel, pursuant to Florida Statutes, Chapters 170 and 173, brings suit in rem for foreclosure against certain lands within the corporate limits of the City of Fort Myers, to wit: Parcels 1 through 6 as described herein in Exhibit "A" attached hereto, (hereinafter referred to as "Defendant Parcels") within the corporate limits of the City of Fort Myers in Special Assessment District No. 10, Special Assessment District No. 15 and Special Assessment District No. 17 (hereinafter referred to as "SAD 10, SAD 15 and SAD 17") upon which special assessment liens are delinquent, and alleges a follows:

1. Plaintiff, City is a Florida municipal corporation with the powers enumerated in Florida Statutes, Chapter 166, with its principal place of business in Lee County, Florida and as such is authorized and empowered to make special assessments and impose special assessment liens upon any and all property within its territorial limits, upon which improvements have been made, pursuant to the powers and functions granted to it under Florida law as a Florida municipality.

2. The City of Fort Myers enacted certain resolutions to make improvements on Defendant Parcels 1 through 6 described in Exhibit "A" attached hereto, in a public improvement geographical area referred to as SAD 10 located in Fort Myers, Lee County, Florida.

3. The City of Fort Myers enacted the necessary resolutions for the creation of SAD 10 and, thereafter, duly published a notice of same, as required by law, advising all interested persons of the passage of same. The interested parties were given an opportunity to make their objections. After hearing all objections submitted, none of the obligations with regard to the above parcels were sustained. The governing body of the City of Fort Myers, thereafter, passed a resolution assessing the above parcels for the costs of the improvements made thereto, and said resolution was duly published as required by law, and the then owners of the property were mailed a notice of the amount of the assessment.

4. Pursuant to Florida law, the aforementioned properties were liened.

5. The SAD 10 special assessments on Defendant, Parcel 1 went into default because the yearly principal

and interest payment that became due thirty (30) days after the billing date of July 1, 1992 in the amount of $2,897.01 and all subsequent payments have not been made.

6. The SAD 10 special assessments on Defendant, parcel 2 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of July 1, 1991 in the amount of $16,249.75 and all subsequent payments have not been made.

7. The SAD 10 special assessments on Defendant, Parcel 3 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of July 1, 1991 in the amount of $58,058.43 and all subsequent payments have not been made.

8. The SAD 10 special assessments on Defendant, Parcel 4 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of July 1, 1991 in the amount of $66,339.01 and all subsequent payments have not been made.

9. The SAD 10 special assessments on Defendant, Parcel 5 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of July 1, 1991 in the amount of $27,177.29 and all subsequent payments have not been made.

10. The SAD 10 special assessments on Defendant, Parcel 6 went into default because the yearly principal

and interest payment that became due thirty (30) days after the billing date of July 1, 1991 in the amount of $165,375.69 and all subsequent payments have not been made.

11. Complainant, City, has declared and hereby does now declare the entire amount owed on Parcels 1 through 6 for SAD 10 improvements to be due and payable pursuant to Section 170.10, Florida Statutes plus accrued interest and penalties.

12. The total sum of $2,494.034.85 is now due and owing on Parcels 1 through 6 for their pro rata share of the SAD 10 assessments, plus accrued interest and penalties.

13. The total sum now due and payable to the City from SAD 10 assessments on Parcel 1 is $20,797.86, plus accrued interest and penalties.

14. The total sum now due and payable to the City from SAD 10 assessments on Parcel 2 is $120,616.67, plus accrued interest and penalties.

15. The total sum now due and payable to the City from SAD 10 assessments on Parcel 3 is $430,948.90, plus accrued interest and penalties.

16. The total sum now due and payable to the City from SAD 10 assessments on Parcel 4 is $492,412.97, plus accrued interest and penalties.

17. The total sum now due and payable to the City from SAD 10 assessments on Parcel 5 is $201,728.23, plus accrued interest and penalties.

18. The total sum now due and payable to the City from SAD 10 assessments on Parcel 6 is $1,227,530.22, plus accrued interest and penalties.

19. More than one (1) year has expired from the date the aforementioned SAD 10 special assessment installments became due and payable.

20. Notice of the delinquent SAD 10 assessments, by registered mail, has been sent to the last known address of the holders of record title and the holders of record of each mortgage or other lien, except judgment liens, upon each tract of land included herein. A certificate that this notice has been sent is attached hereto.

21. The City of Fort Myers is also entitled to all claims and demands for any other special assessments or installments which are due and payable on the defendant parcels at the institution of this action, pursuant to Fla. Stat. § 173.03(2) and 170.10.

22. In addition to the SAD 10 assessments, special assessment installments for SAD 15 and SAD 17 are also due and payable.

23. The City of Fort Myers enacted certain resolutions to make improvements on Defendant Parcels 2 through 6 as described in Exhibit "A" attached hereto, in a public improvement geographical area referred to as Sad 15, located in Fort Myers, Lee County, Florida.

24. The City of Fort Myers enacted the necessary resolutions for the creation of SAD 15 and, thereafter, duly published a notice of same, as required by law, advising all interested persons of the passage of same. The interested parties were given an opportunity to make

their objections. After hearing all objections submitted, none of the objections with regard to the above parcels were sustained. The governing body of the City of Fort Myers, thereafter, passed a resolution assessing the above parcels for the costs of the improvements made thereto, and said resolution was duly published as required by law, and the then owners of the property were mailed a notice of the amount of the assessment.

25. Pursuant to Florida law, the aforementioned properties were liened.

26. The SAD 15 special assessments on Defendant, Parcel 2 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $81,921.69 and all subsequent payments have not been made.

27. The SAD 15 special assessments on Defendant, Parcel 3 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $292,696.40 and all subsequent payments have not been made.

28. The SAD 15 special assessments on Defendant, Parcel 4 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $334,442.21 and all subsequent payments have not been made.

29. The SAD 15 special assessments on Defendant, Parcel 5 went into default because the yearly principal

and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $137,011.89 and all subsequent payments have not been made.

30. The SAD 15 special assessments on Defendant, Parcel 6 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $833,726.81 and all subsequent payments have not been made.

31. Complainant, City, has declared and hereby does now declare the entire amount owed on Parcels 2 through 6 for the SAD 15 improvements to be due and payable pursuant to Section 170.10, Florida Statutes plus accrued interest and penalties.

32. The total sum of $11,954,537.93 is now due and owing on Parcels 2 through 6 for their pro rata share of the SAD 15 assessments, plus interest and penalties.

33. The total sum now due and payable to the City for SAD 15 assessments on Parcel 2 is $583,007.82, plus accrued interest and penalties.

34. The total sum now due and payable to the City for SAD 15 assessments on Parcel 3 is $2,083,017.22, plus accrued interest and penalties.

35. The total sum now due and payable to the City for SAD 15 assessments on Parcel 4 is $2,380,107.44, plus accrued interest and penalties.

36. The total sum now due and payable to the City for SAD 15 assessments on Parcel 5 is $975,065.35, plus accrued interest and penalties.

37. The total sum now due and payable to the City for SAD 15 assessments on Parcel 6 is $5,933,340.10, plus accrued interest and penalties.

38. Notice of the delinquent SAD 15 assessments, by registered mail, has been sent to the last known address of the holders of record title and the holders of record of each mortgage or other lien, except judgment liens, upon each tract of land included herein. A certificate stating that this notice has been sent is attached hereto.

39. The City of Fort Myers enacted certain resolutions to make improvements on Defendant Parcels 2 through 6 described in Exhibit "A" attached hereto, in a public improvement geographical area referred to as SAD 17 located in Fort Myers, Lee County, Florida.

40. The City of Fort Myers enacted all necessary resolutions for the creation of SAD 17 and, thereafter, duly published a notice of same, as required by law, advising all interested persons of the passage of same. The interested parties were given an opportunity to make their objections. After hearing all objections submitted, none of the objections with regard to the above parcels were sustained. The governing body of the City of Fort Myers, thereafter, passed a resolution assessing the above parcels for the improvements made thereto, and said resolution was duly published as required by law, and the then owners of the property were mailed a notice of the amount of the assessment.

41. The City duly recorded its lien on the aforementioned property.

42. The SAD 17 special assessments on Defendant, Parcel 2 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $26,632.66 and all subsequent payments have not been made.

43. The SAD 17 special assessments on Defendant, Parcel 3 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $95,155.31 and all subsequent payments have not been made.

44. The SAD 17 special assessments on Defendant, Parcel 4 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $108,726.83 and all subsequent payments have not been made.

45. The SAD 17 special assessments on Defendant, Parcel 5 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $44,542.43 and all subsequent payments have not been made.

46. The SAD 17 special assessments on Defendant, Parcel 6 went into default because the yearly principal and interest payment that became due thirty (30) days after the billing date of April 1, 1993 in the amount of $271,043.77 and all subsequent payments have not been made.

47. Complainant, City has declared and hereby does now declare the entire amount on Parcels 2 through 6 for SAD 17 improvements to be due and payable pursuant to Section 170.10, Florida Statutes plus accrued interest and penalties.

48. The total sum of $3,886,417.14 is now due and owning on Parcels 2 through 6 for their pro rata share of the SAD 17 assessments, plus accrued interest and penalties.

49. The total sum now due and payable to the City for SAD 17 assessments on Parcel 2 is $189,535.69, plus accrued interest and penalties.

50. The total sum now due and payable to the City for SAD 17 assessments on Parcel 3 is $677,188.34, plus accrued interest and penalties.

51. The total sum now due and payable to the City for SAD 17 assessments on Parcel 4 is $773,772.20, plus for accrued interest and penalties.

52. The total sum now due and payable to the City for SAD 17 assessments on Parcel 5 is $316,993.49, plus accrued interest and penalties.

53. The total sum now due and payable to the City for SAD 17 assessments on Parcel 6 is $1,928,927.34, plus accrued interest and penalties.

54. Notice of the delinquent SAD 17 assessments, by registered mail, has been sent to the last known address of the holders of record title and the holders of record of each mortgage or other lien, except judgment liens, upon each tract of land included herein. A certificate stating that this notice has been sent is attached hereto.

55. All of the applicable laws of the State of Florida, and all conditions precedent to establishing the validity of the above assessments and their foreclosure have been complied with.

56. Complainant, City, is entitled to cost of the suit and reasonable attorney's fees pursuant to Section 173.08, Florida Statutes.

WHEREFORE, Complainant, CITY OF FORT MYERS, demands judgment against Defendant Parcels in SAD 10, 15 and 17, for the sum of $18,334,989.92 through October 31, 1993, plus additional interest and penalties which continue to accrue.

Additionally, Complainant, CITY OF FORT MYERS, demands the appointment of a special master to handle and sell the aforementioned parcels of land in SAD 10, SAD 15 and SAD 17; adjudication of its liens and a finding that its liens are prior and superior to the right, title and interest or lien holders with respect to the property of this action; and accounting of the sums due under the special assessment notes and liens, including principal and accrued interest; all costs of the proceedings, taxes, title expenses and reasonable attorney's fees. Such sale shall be subject to confirmation by the court, and said special master shall, upon confirmation of the sale or sales, deliver to the purchase or purchasers at said sale a deed of conveyance of the property so sold; provided, however, that in any case where any lands are offered for sale by the special master and the sum of the special assessments, interest, penalty, costs and attorney's fee is not bid for the same, the City may bid the whole amount

due and the special master shall thereupon convey such parcel or parcels of land in fee simply to the City.

Respectfully submitted,

CITY OF FORT MYERS

By: /s/ Jacqueline W. Hubbard
Jacqueline W. Hubbard
City Attorney
City of Fort Myers
P.O. Drawer 2217
Ft. Myers, Florida 33902
(813) 332-6707
Florida Bar No. 468126

CERTIFICATE OF SERVICE

I CERTIFY that a written Notice of Intention to File this Bill of Complaint was sent by registered mail to the last known address of the holder of record title and the holder of record of each mortgage or other lien except judgment liens upon each tract of land included in this Complaint as required by Section 173.04(1), Fla. Stat.

I FURTHER CERTIFY that a true copy of this Amended Complaint was furnished to the record holders of title, mortgages and liens by registered mail, to wit:

Lee County Tax Collector
P.O. Box 850
Fort Myers, Florida 33902

Donald B. and Sharon Fisher
11761 Caravel Circle SW
Fort Myers, Florida 33908

John Turner, Esq.
Lee County Attorney's Office
P.O. Box 398
Fort Myers, Florida 33902

Date: October 15, 1993

/s/ Jacqueline Williams Hubbard
Jacqueline Williams Hubbard
City Attorney
City of Fort Myers
P.O. Drawer 2217
Fort Myers, Florida 33902
(813) 332-6707
Florida Bar No. 468126

CERTIFICATE OF SERVICE

I CERTIFY that a written Notice of Intention to File this Bill of Complaint was sent by registered mail to the last known address of the holder of record title and the holder of record of each mortgage or other lien except judgment liens upon each tract of land included in this Complaint as required by Section 173.04(1), Fla. Stat.

I FURTHER CERTIFY that a true copy of this Amended Complaint was furnished to the record holders of title, mortgages and liens by hand delivery to John Rains, III, Esq., to wit:

Mr. Ronald E. Wiss, Jr.
280 Corporate Center
5 Becker Farm Road
Roseland, New Jersey 07068

Mr. John O. Zipperer
P.O. Box 640
Fort Myers, Florida 33902

Date: October 18, 1993

/s/ Jacqueline Williams Hubbard
City Attorney
City of Fort Myers
P.O. Drawer 2217
Fort Myers, Florida 33902
(813) 332-6707
Florida Bar No. 468126

EXHIBIT "A"

PARCEL 1

A tract or parcel of land lying in the Northwest Quarter (NW 1/4) of Section 34, Township 44 South, Range 25 East, City of Fort Myers, Lee County, Florida, which tract or parcel is described as follows:

From the Northwest corner of said Section 34 runs S 00° 47' 23" E for 150.60 feet to an intersection with the South line of Colonial Boulevard (State Road No. 884); thence run N 88° 32' 12" E along said South line for 47.26 feet; thence run S 85° 54' 08" E along said South line for 13.88 feet to the Point of Beginning.

From said Point of Beginning continue S 85° 54' 08" E along said South line of Colonial Boulevard for 553.61 feet; thence run S 74° 35' 51" E for 154.87 feet; thence run S 47° 56' 56" E for 70.25 feet; thence run S 35° 53' 21" W

for 486.80 feet to a point of curvature; thence run Northwesterly and Westerly along the arc of a curve to the left of radius 800.00 feet (chord bearing N 75° 18' 31" W) (chord 448.80 feet) (delta 32° 34' 47") for 454.90 feet to a point of tangency; thence run S 88° 24' 05" W for 26.24 feet to a point of curvature; thence run Northwesterly and Northerly along the arc of a curve to the right of radius 35.00 feet (chord bearing N 46° 14' 59" E) (chord 51.90 feet) (delta 95° 41' 47") for 58.46 feet to the Point of Beginning.

TOGETHER WITH a non-exclusive easement over and across the following described parcel, to-wit:

A tract of parcel of land lying in the East Half (E 1/2) of Section 33 and the West Half (W 1/2) of Section 34, Township 44 South, Range 25 East, City of Fort Myers, Lee County, Florida which tract or parcel is described as follows:

From the Northeast corner of said Section runs S 00° 47' 23" E along the East line of Section 33 for 150.60 feet to an intersection with the South line of Colonial Boulevard (State Road No. 884) and the Point of Beginning.

From said Point of Beginning run N 88° 32' 12" E along said South line for 47.26 feet; thence run S 85° 54' 08" E for 13.88 feet to a point of curvature; thence run Westerly, Southwesterly and Southerly along the arc of a curve to the left of radius 35.00 feet (chord bearing S 46° 14' 59" W) (chord 51.90 feet) (delta 95° 41' 47") for 58.46 feet of tangency; thence run S 01° 35' 55" E for 339.28 feet to a point of curvature; thence run Southerly, Southeasterly and Easterly along the arc of a curve to the left of radius 35.00 feet (chord bearing S 46° 24' 05" E) (chord 49.50 feet)

(delta 90° 00' 00") for 54.98 feet to a point of tangency; thence run N 01° 35' 55" W for 340.86 feet to a point of curvature; thence run Northerly, Northwesterly and Westerly along the arc of a curve to the left of radius 35.00 feet (chord bearing N 46° 31' 54" W) (chord 49.44 feet) (delta 89° 51' 53") for 54.90 feet to a point of tangency along said South line of Colonial Boulevard; thence run N 88° 32' 12" E for 112.31 feet to the Point of the Beginning.

PARCEL 2

The Power of the Southwest Quarter (SW 1/4) of Section 22, Township 44 South, Range 25 East, lying Easterly of Interstate 75 and Southerly of State Road 82, Less the Easterly 660 feet thereof.

PARCEL 3

The Northwest Quarter (NW 1/4) and that part of the West One Half (W 1/2) of the Southwest Quarter (SW 1/4) of Section 27, Township 44 South, Range 25 East lying Easterly of Interstate 75.

PARCEL 4

The East one-half of Section 22, Township 44 South, Range 25 East, Lying South of SR-82, together with the East 660 feet of the West one-half of said Section, Less Interstate 75 right-of-way, lying and being in Lee County, Florida.

PARCEL 5

The West one-half of the Northwest one-quarter of Section 26, Township 44 South, Range 25 East Less Tax

Identification Parcels 2.001 and 2.1000, lying and being in Lee County, Florida.

PARCEL 6

The East one-half and the East one-half of the Southwest 1/4 of Section 27, Township 44 South, Range 25 East, Less Interstate 75 Right-of-way and also less Six Mile Cypress, lying and being in Lee County, Florida.

APPENDIX 2

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, STATE OF FLORIDA CIVIL DIVISION

CITY OF FT. MYERS, a Florida municipal corporation,
Plaintiff,

Case No. 93-7263CA I

Florida Bar Nos. 280283
983993

vs.

CERTAIN LAND UPON WHICH SPECIAL ASSESSMENTS, DISTRICTS 10, 15 AND 17 ASSESSMENTS ARE DELINQUENT,

Defendants.

_____ /

ANSWER AND AFFIRMATIVE DEFENSES AND COUNTERCLAIM TO AMENDED BILL OF COMPLAINT FOR FORECLOSURE (IN REM)

Defendant, JOHN O. ZIPPERER, JR. ("Mr. Zipperer"), by counsel, files this Answer, Affirmative Defenses and Counterclaim in response to the Plaintiff, CITY OF FT. MYERS' Amended Bill of Complaint for Foreclosure (In Rem) and states:

ANSWER

1. Without knowledge and therefore denied.
2. Without knowledge and therefore denied.
3. Without knowledge and therefore denied.
4. Denied.
5. Without knowledge and therefore denied.
6. Without knowledge and therefore denied.
7. Without knowledge and therefore denied.

8. Without knowledge and therefore denied.
9. Without knowledge and therefore denied.
10. Without knowledge and therefore denied.
11. Denied.
12. Denied.
13. Denied.
14. Denied.
15. Denied.
16. Denied.
17. Denied.
18. Denied.
19. Denied.
20. Denied.
21. Without knowledge and therefore denied.
22. Denied.
23. Denied.
24. Without knowledge and therefore denied.
25. Denied.
26. Denied.
27. Denied.
28. Denied.
29. Denied.
30. Denied.
31. Denied.

32. Denied.
33. Denied.
34. Denied.
35. Denied.
36. Denied.
37. Denied.
38. Without knowledge and therefore denied.
39. Without knowledge and therefore denied.
40. Denied.
41. Without knowledge and therefore denied.
42. Denied.
43. Denied.
44. Denied.
45. Denied.
46. Denied.
47. Denied.
48. Denied.
49. Denied.
50. Denied.
51. Denied.
52. Denied.
53. Denied.
54. Without knowledge and therefore denied.
55. Denied.
56. Denied.

AFFIRMATIVE DEFENSES

Denial of Procedural Due Process:

57. The alleged special assessment liens the City of Ft. Myers is seeking to foreclose are invalid liens and cannot be foreclosed as to this defendant because the City of Ft. Myers failed to give Mr. Zipperer, a prior mortgagee of parcels of land foreclosure is sought upon, written notice of the special assessment and lien creation hearings which purported to assess the special assessments and create the liens sought to be foreclosed. The City of Ft. Myers' failure to provide Mr. Zipperer with written notice of the special assessment and lien creation hearings denied Mr. Zipperer the "Notice and Opportunity to be Heard" Mr. Zipperer and the other Mortgagees were entitled to receive under the Due Process Clauses of the United States and Florida Constitutions.

Taking Without Compensation

58. The alleged special assessment liens are invalid and cannot be foreclosed because, by enacting the special assessment liens and by allegedly making the special assessment liens first priority liens, the City of Ft. Myers attempted to deprive Mr. Zipperer of his property interest in his first mortgage lien without paying Mr. Zipperer the compensation required by the Taking Clauses of the United States and Florida Constitutions.

Illegality: Not for a Public Purpose

59. The alleged special assessments sought to be foreclosed by the City of Ft. Myers are illegal and invalid

and cannot be foreclosed because they were not imposed for a public purpose. They were imposed for the benefit of a private developer. For example: special assessment funds were utilized to reimburse the developer for costs incurred by the developer for obtaining a Development of Regional Impact (DRI) Order.

Illegality: Not for the Benefit of the Land Assessed

60. The alleged special assessments sought to be foreclosed by the City of Ft. Myers are illegal and invalid or should be reduced to the extent that assessment funds were for purposes that did not provide a direct benefit to the land assessed. For example: portions of the assessments were used to reimburse the developer for costs incurred for obtaining a Development of Regional Impact Order, unnecessary and excessive City of Ft. Myers administrative costs were assessed, assessments were made for improvements which were not then existent and which have not been completed and assessments were made on parcels of land which were not contingent to the assessed "improvements" and received no direct benefit from those improvements.

Equitable Defense: Unclean Hands

61. The City of Ft. Myers is prevented from foreclosing upon these alleged special assessment liens because it has "unclean hands" in that the City of Ft. Myers utilized portions of the funds assessed for illegal and/or improper purposes, including the reimbursement of Development of Regional Impact Order costs incurred by the developer.

Mr. Zipperer is a Superior Lienholder

62. Mr. Zipperer's parcels should be dismissed from this action because the City of Ft. Myers' special assessment liens are junior and inferior to Mr. Zipperer's prior recorded first mortgage lien and the City, as a junior lienholder, cannot foreclose upon Mr. Zipperer's superior first mortgage lien. In the alternative, the City of Ft. Myers' liens are junior and inferior to Mr. Zipperer's prior recorded first mortgage lien because the City of Ft. Myers did not provide Mr. Zipperer with written notice of the meeting wherein the City purported to subordinate Mr. Zipperer's first mortgage lien to the City's special assessment liens and, therefore, violated Mr. Zipperer's due process rights to "notice and an opportunity to be heard" (prior to being deprived of his property right in his first mortgage lien) under both the United States and Florida Constitutions.

Invalidity of Chapter 173, *Florida Statutes*

63. This lawsuit should be dismissed because the City of Ft. Myers cannot foreclose upon Mr. Zipperer's land via a *Florida Statutes*, Chapter 173, foreclosure action against "certain lands" because the procedural provisions of Chapter 173, which this suit has been brought under, are unconstitutional under the Florida Constitution's Separation of Powers Doctrine which provides that the legislature does not have the power to legislate judicial procedure as the legislature has attempted to do in *Florida Statutes*, Chapter 173.

Invalidity of *Florida Statutes, Section 173.07*

64. This lawsuit should be dismissed or, in the alternative, Florida Statutes, Section 173.07 should be declared invalid because, to the extent that Florida Statutes, Section 173.07 requires Mr. Zipperer to tender funds into the Registry of this Court prior to challenging the propriety or legality of the City's alleged special assessments, Florida Statutes, Section 173.07 is an unconstitutional denial of Mr. Wiss' access to courts as guaranteed by Article I, Section 21 of the Florida Constitution.

Invalidity of Chapter 170, *Florida Statutes*

65. The City of Ft. Myers cannot foreclose its special assessment liens because, as applied to mortgagees such as Mr. Zipperer, the enabling statute, Chapter 170, *Florida Statutes,* which the special assessment liens were enacted under, is invalid. To the extent that *Florida Statutes,* Chapter 170, does not require that written notice of special assessment meetings be given to mortgagees, Chapter 170 is invalid because is [sic] denies mortgagees, such as Mr. Zipperer, the right of "notice and an opportunity to be heard," prior to action taken to subordinate their lien, under the Due Process Clause of the United States and Florida Constitutions and also results in a "taking" of a first mortgage lien without compensation in violation of the "takings" clauses of the United States and Florida Constitutions.

Invalidity: Failure to Follow Procedures Required Under Chapter 170, *Florida Statutes*

66. The alleged special assessment liens which The City of Fort Myers seeks to foreclose are invalid and cannot be foreclosed or, in the alternative, should be reduced because The City of Fort Myers failed to follow the required assessment procedures of Chapter 170, *Florida Statutes*. For instance, The City of Fort Myers levied assessments against parcels within District 10 which were not on the preliminary assessment rolls for District 10 as required by *Florida Statutes*, Chapter 170.

Denial of Substantive Due Process

67. The alleged special assessment liens against Mr. Zipperer's property, which the City of Ft. Myers is seeking to foreclose, are invalid and cannot be foreclosed or, in the alternative, should be reduced because the assessments were made in an arbitrary, capricious and unreasonable manner in that the property assessed in the Special Assessment Districts was assessed on a per acreage basis without regard to the front footage the various parcels have upon the improvements and without consideration of the relative benefits to individual parcels. For instance: In Special Assessment District 17 a parcel that had no front footage upon the improvements was assessed at the same rate of assessment as parcels fronting the improvements. Furthermore, land owned by the City of Ft. Myers within the assessed parcels was not subtracted from the total acreage figures used to calculate the assessment amount on the individual parcels and assessments were made upon portions of land which

were not on the preliminary assessment roll as required by *Florida Statutes*, Chapter 170.

The Assessments Were Detrimental to the Value of the Land Assessed

68. The alleged special assessment liens the City of Ft. Myers is seeking to foreclose are invalid and cannot be foreclosed because the "improvements" which the assessments were levied for did not increase the value of the land assessed and, in fact, actually decreased the value of the land assessed by making it less suitable for agricultural use.

The City of Ft. Myers is not the Real Party in Interest and does not have Standing to Bring this Action

69. The City of Ft. Myers cannot bring this action to foreclose upon the alleged special assessment liens in Special Assessment Districts 10, 15, and 17 because the individual Special Assessment Districts and not the City of Ft. Myers are the real parties in interest and the City of Ft. Myers has not and cannot bring a foreclosure action under Chapter 173, *Florida Statutes*, on behalf of Special Assessment Districts 10, 15 and 17.

Assessment Invalidity Due to Unenforceable Underlying Obligations

70. The alleged special assessment liens the City of Ft. Myers is seeking to foreclose are invalid liens and cannot be foreclosed or should be reduced to the extent that the underlying obligations which the assessments are

based upon, including the contracts and bonds, are invalid. For example: the obligation the City incurred by reimbursing the developer for costs incurred by the developer for obtaining a Development of Regional Impact Order is invalid.

Assessment Invalidity Due to Invalid Bonds

71. The alleged special assessment liens the City of Ft. Myers is seeking to foreclose are invalid liens and cannot be foreclosed or should be reduced to the extent that the underlying bonds financing the assessments are invalid because the City has, in effect, pledged ad valorem and other tax revenues to secure those bonds without a vote of the electors as required by Article VII, Section 12 of the Florida Constitution.

Alternate Entitlement to Reduction of Assessment Amount

73. In the event that the alleged special assessment liens are not invalidated, then Mr. Zipperer is entitled to have the amount of the assessment reduced;

a) by the amount equal to the amount assessed against land within Mr. Zipperer's assessed parcels which is actually owned by the City of Ft. Myers or other entities, and

b) by the Amounts that any bond, contract or other obligation or expenditure of assessment funds is found to be invalid, and

c) by an amount equal to the difference between the cost of the "improvements" and the actual

increase in fair market value to Mr. Zipperer's land as a result of the "improvements," and

d) by the amount that the assessment amounts exceeded the actual cost of the "improvements," and

e) by any amount that was assessment upon portions of Mr. Zipperer's property which did not appear on the preliminary assessment rolls as required by *Florida Statutes*, Chapter 170.

COUNTERCLAIM

Counterclaimant, JOHN O. ZIPPERER, JR. ("Mr. Zipperer"), sues Defendant, THE CITY OF FORT MYERS ("City"), a chartered municipality and political subdivision of the State of Florida, Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District ("District 10 Governing Authority"); Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park ("District 15 Governing Authority"); Fort Myers City Council, as the Governing Authority of Improvement District No. 17 ("District 17 Governing Authority"); Improvement District No 10, Northeast Colonial Sewer and Water Assessment District ("District 10"); Improvement District No. 15, Omni Interstate Park ("District 15"); and Improvement District No. 17 ("District 17") and alleges:

GENERAL ALLEGATIONS

1. This is an action for subordination and foreclosure of special assessment liens, declaratory relief and damages in excess of $15,000.00

2. Plaintiff is a citizen of the State of Florida and a resident of Lee County, Florida.

3. City is a chartered municipality pursuant to Chapter 165, *Florida Statutes*, and a political subdivision of the State of Florida.

4. District 10 Governing Authority is the governing authority of District 10 pursuant to Chapter 170, *Florida Statutes* and Resolution No. 86-48 of the Fort Myers City Council, Florida ("City Council").

5. District 15 Governing Authority is the governing authority of District 15 pursuant to Chapter 170, *Florida Statutes* and City Council Resolution No. 88-56.

6. District 17 Governing Authority is the governing authority of District 17, pursuant to Chapter 170, *Florida Statutes* and City Council Resolution No. 86-64.

7. District 10 is an improvement district pursuant to Chapter 170, *Florida Statutes* and City Council Resolution No. 86-48.

8. District 15 is an improvement district pursuant to Chapter 170, *Florida Statutes* and City Council Resolution No. 86-56.

9. District 17 is an improvement district pursuant to Chapter 170, *Florida Statutes* and City Council Resolution No. 88-64.

10. All conditions precedent to the relief requested herein have been performed, have occurred or have otherwise been waived.

FACTS

11. On August 14, 1986, P. Gerald DeSimone, Trustee ("DeSimone"), executed and delivered to Mr. Zipperer a Promissory Note in the principal amount of Eight Million Nine Hundred Thousand and No/100 Dollars ($8,900,000.00) which called for three (3) annual payments of interest only and thereafter for six (6) annual payments of principal and interest in the amount of One million Five Hundred Eleven Thousand Two Hundred Twenty and No/100 Dollars ($1,511,220.00) with the remaining outstanding principal and all accrued interest to be due and payable on maturity on August 14, 1996. A true and correct copy of the Promissory Note is attached to this Counterclaim and incorporated herein as Exhibit 1.

12. On August 14, 1986, in order to secure the Promissory Note referred to above, DeSimone executed and delivered to Mr. Zipperer a Mortgage Deed which was recorded on August 14, 1986 in Official Record Book 1862, Pages 4282-4286, of the Public Records of Lee County, Florida and by which DeSimone granted to Mr. Zipperer a security interest in and to the real property described in the Mortgage Deed together with all oil, gas and mineral rights (the "Mortgaged Property"). In the Mortgage Deed, DeSimone warranted that the Mortgaged Property was free from all encumbrances. The mortgage had no

provision providing for any subordination of Mr. Zipperer's mortgage to any subsequent development or construction financing and, indeed, Mr. Zipperer specifically objected to any such provision when the mortgage terms were negotiated. In addition, the Mortgage Deed which was recorded and thus giving constructive notice to anyone attempting to impose a subsequent lien on the property, contains a provision expressly prohibiting "waste, *impairment* or deterioration of said property or any part thereof." A true and correct copy of the Mortgage Deed is attached to this Counterclaim and incorporated herein as Exhibit 2.

13. On November 18, 1986, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on December 9, 1986, in official Record Book 1884, Pages 1456-1457, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to include as security for the Promissory Note all oil and mineral rights to the real property described in Exhibit 3, attached to this Counterclaim and incorporated herein by reference. A true and correct copy of the November 18, 1986 Mortgage Modification Agreement is attached to this Counterclaim and incorporated herein as Exhibit 4.

14. On October 26, 1990, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on November 8, 1990, in Official Record Book 2185, Pages 4652-4654, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to provide for a payment of unpaid interest and accrued interest thereon to be due and payable on December 1, 1990 and thereafter for

annual payments of principal and interest commencing on August 14, 1992 with all remaining outstanding principal and accrued interest thereon to be due and payable at maturity on August 14, 1996. A true and correct copy of the October 26, 1990 Mortgage Modification Agreement is attached to this Counterclaim and incorporated herein as Exhibit 5.

15. Mr. Zipperer owns and holds the Mortgage Deed, Promissory Note, November 18, 1986 Mortgage Modification Agreement and the October 26, 1990 Mortgage Modification Agreement. Under Florida law, the subordination of a preexisting mortgage from a first to a second lien position is recognized as an immediate impairment. Any subordination automatically puts the preexisting mortgagee at a substantially greater risk of losing its investment if it has a second, as opposed to a first, priority lien without even considering the value of the underlying property.

16. The Mortgage Property is made up of Parcel Nos. 27-44-25-OC-08606. 0000 ("8606"), 26-44-25-OC-08602. 0000 ("8602"), and 2244-25-OC-08601.0000 ("8601").

17. Pursuant to City Council Resolution No. 88-28, as amended by City Council Resolution No. 90-46, a Development Order was issued for Omni Interstate Park, which includes the Mortgaged Property.

DISTRICT 10

18. On September 22, 1986, the City Council entered Resolution No. 86-48 which created District 10 in the City

of Fort Myers, Florida and in Lee County Florida. District 10, which included the Mortgaged Property, was created pursuant to Chapter 170, *Florida Statutes*, "for the construction of local sanitary sewage transmission mains, lift stations, water transmission mains, and other appurtenant facilities." The estimated cost of construction in District 10 was $13,000,000.00 with $10,000,000.00 to be borne by the properties in District 10, including the Mortgaged Property. A true and correct copy of Resolution No. 86-48 is attached to this Counterclaim and incorporated herein as Exhibit 6.

19. Through Resolution No. 88-5 of February 16, 1988, the District 10 Governing Authority adopted the assessment roll for District 10. Resolution No. 88-5 contemplated that property owners and "other persons interested" in the property (presumably other directly affected persons, such as mortgagees) could appear before the District 10 Governing Authority to be heard as to the propriety and advisability of the improvements to District 10, the assessments and the method of assessment. However, Resolution No. 88-5 only directed that property owners receive written notice of the meeting to be held to discuss these issues. Nowhere did Resolution No. 88-5 provide for written notice to mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. In fact, the City Clerk or consulting engineer did review the public records to locate the names of the property owners to receive the written notice. Given that fact, deriving from those same public records the identity of prior recorded mortgages and providing written notice to those mortgagees that a special assessment that would subordinate

their lien mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $377,000.00 out of the $10,000,000.00 went directly to the City for "administration," this "burden" is not unreasonable. The assessment roll attached to Resolution No. 88-5 included Parcel Nos. 8601 and 8602, but did not include Parcel No. 8606. A true and correct copy of Resolution No. 88-5 is attached hereto and incorporated herein as Exhibit 7.

20. Through Resolution No. 88-8 of March 7, 1988, the District 10 Governing Authority levied certain special assessments on the properties on the District 10 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid and binding first liens, coequal with the lien of other taxes and superior to all other liens, titles and claims, until paid. Resolution No. 88-8 directed the City Clerk to record the assessments. Resolution No. 88-8 was recorded in Official Record Book 2002, Pages 2419-2430 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 88-8 is attached to this Counterclaim and incorporated herein as Exhibit 8.

21. Through Resolution No. 89-70 of November 6, 1989, the District 10 Governing Authority authorized the City Clerk to file a lien on the District 10 properties, including the Mortgaged Property for the unpaid pro rata cost of improvements made in District 10. Resolution No.

89-70 included Parcel Nos. 8801, 8802 and 8806. Resolution No. 89-70 was recorded in Official Record Book 2109, Pages 3829-3838 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-70 is attached to this Counterclaim and incorporated herein as Exhibit 9.

22. Although the actual improvements for Phase I of the District 10 improvements were only $8,235,757.00, through Resolution No. 89-70, the District 10 Governing Authority authorized the liening of the District 10 properties, including the Mortgaged Property, for a pro rata cost per acre for $10,000,000.00, that is, the full amount of the estimated cost of improvements to be borne by the District 10 properties.

23. Although Mr. Zipperer was a prior mortgage holder through the Mortgage Deed which is Exhibit 2, Mr. Zipperer was not given actual written notice of the proposed District 10 assessments, nor any of the other proposed Districts described below, explaining that the assessments would become a "first lien" over his first mortgage.

DISTRICT 15

24. On October 17, 1988, City Council entered Resolution No. 88-56 which created District 15 in the City of Fort Myers, Florida District 15, which included the Mortgaged Property, was created pursuant to Chapter 170, *Florida Statutes*, "for the construction of a water distribution system, wastewater collection system, paving improvements, including the construction of Omni Boulevard, S.E. entrance and Cypress Loop Road and other

appurtenant facilities." The estimated cost of construction in District 15 was $10,900,000.00. A true and correct copy of Resolution No. 88-56 is attached to this Counterclaim and incorporated herein as Exhibit 10.

25. Through Resolution No. 89-26 of April 17, 1989, the District 15 Governing Authority adopted the assessment roll for improvements to District 15. Resolution No. 89-26 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the District 15 Governing Authority to be heard as the propriety and advisability of the improvements to District 15, the assessments, and the method of assessment. However, Resolution No. 89-26 only directed that property owners receive written notice of the meeting to be held to discuss these issues. *Nowhere* did Resolution No. 89-26 provide for written notice to mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the identity of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $282,600.00 out of the

$10,900,000.00 went directly to the City for "Administration," this "burden" is not unreasonable. The assessment roll included Parcels No. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-26 is attached to this Counterclaim and incorporated herein as Exhibit 11.

26. Through Resolution No. 89-32 of May 15, 1989, the District 15 Governing Authority levied certain special assessments on the properties on the District 15 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid and binding first liens, coequal with liens of other taxes and superior to all of the liens, titles, and claims until paid. Resolution No. 89-32 directed the City Clerk to record the assessments. Resolution No. 89-32 was recorded in official Record Book 2072, Pages 3091-3094 of the public Records of Lee County, Florida. These special assessments, as recorded in Resolution No. 89-32, have been imposed as a lien on the property. A true and correct copy of Resolution No. 89-32 is attached to this Counterclaim and incorporated herein as Exhibit 12.

DISTRICT 17

27. On November 21, 1988, City Council entered Resolution No. 88-64 which created District 17 in the City of Fort Myers, Florida. District 17, which included the Mortgaged Property, was created pursuant to Chapter 170, *Florida Statutes*, for the design and installation of roadways and other appurtenant facilities. The estimated cost of construction in District 17 was $6,017,000.00 A true and correct copy of Resolution No. 88-64 is attached

to this Counterclaim and incorporated herein as Exhibit 13.

28. Through Resolution No. 89-25 of April 17, 1989, the District 17 Governing Authority adopted the assessment roll for the improvements to District 17. Resolution No. 89-25 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the City Council to be heard as to the propriety and advisability of the improvements to District 17, the assessments, and the method of assessment. However, Resolution No. 90-25 only directed that property owners receive written notice of the meeting to discuss these issues. *Nowhere* did Resolution No. 89-25 provide for written notice to mortgagees or any other interested parties, although mortgagees could have been easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the identity of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $260,000.00 out of the $6,017,000.00 went directly to the City for Administration, this "burden" is not unreasonable. The assessment roll included Parcel Nos. 8606,

8602, and 8601. A true and correct copy of Resolution No. 89-25 is attached to this Counterclaim and incorporated herein as Exhibit 14.

29. Through Resolution No. 90-33 of May 15, 1989, the District 17 Governing Authority levied certain special assessments on the properties on the District 17 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid, and binding first liens, coequal with liens of other taxes and superior to all other liens, titles, and claims, until paid. Resolution No. 89-33 directed the City Clerk to record the assessments. Resolution No. 89-33 was recorded in Official Record Book 2072, Pages 3095-3099 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-33 is attached to this Counterclaim and incorporated herein as Exhibit 15.

COUNT I

Cause of Action Against City of Fort Myers,
District 10 Governing Authority,
District 15 Governing Authority,
District 17 Governing Authority,
District 10, District 15 and District 17:
Denial of Mr. Zipperer's Right to Procedural and Substantive Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 29 as if fully set forth herein.

30. The City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing

Authority, District 10, District 15 and District 17 (hereinafter collectively "City Entities") failed to provide Mr. Zipperer with notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

31. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

32. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County and expressly prohibited any impairment. The Mortgaged Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

33. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were

allegedly adopted pursuant to the provisions of Chapter 170, *Florida Statutes*. Chapter 170, *Florida Statutes* provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, *Florida Statutes*, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, *Florida Statutes* also provides that ten (10) days written notice in writing of the hearing time and place shall be given to the property owner by certified mail. Section 170.09, *Florida Statutes* provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

34. The City Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The City Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the City Entities could have provided notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the

rights of innocent lien holders. In addition, the City Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

35. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, *Florida Statutes.*

36. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Districts 10, 15, and 17, to notice of the proposed special assessments and their nature.

37. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which

assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

38. Because the City Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

39. The City Entities denied Mr. Zipperer his right to due process, as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritization of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the costs of this action, and other such relief as the Court deems just, necessary, and proper.

COUNT II

Cause of Action Against The City Entities: § 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 29 as if fully set forth herein.

40. The City Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

41. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

42. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property, special assessments would become a lien superior to Mr. Zipperer's security interest in the Mortgaged property and that would become superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

43. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were

adopted pursuant to the provisions of Chapter 170, *Florida Statutes*. Chapter 170, *Florida Statutes* provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, *Florida Statutes*, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed or any other interested persons may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, *Florida Statutes* also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, *Florida Statutes* provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

44. Under color of state law, the City Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was a part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property.

45. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the

mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, *Florida Statutes.*

46. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property which was included in Districts 10, 15, and 17 to notice of the proposed special assessments and their nature.

47. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first Purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

48. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is

required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A. Section 1988.

49. Because the City Entities failed to provide the requisite written notice reasonably calculated to apprise Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

50. The City Entities acting under color of state law denied Mr. Zipperer his right to due process.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment liens, compensatory damages, attorneys' fees, the costs of this action, and other such relief as the Court deems just, necessary, and proper.

COUNT III

Cause of Action Against The City Entities: Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 though 29 as if fully set forth herein.

51. The assessments made on the Mortgaged Property pursuant to the Resolutions entered by the City

Entities constitute an illegal taking of Mr. Zipperer's property.

52. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

53. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

54. The Resolutions which the City Entities passed which levied special assessments on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the mortgaged Property.

55. As a direct and proximate result of the City Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the District 10, 15 and 17 special assessment liens.

56. The City Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed

expectations for the Mortgaged Property without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action and other relief as the Court deems just, necessary and proper.

COUNT IV

Cause of Action Against The City Entities: Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 though 39 as if fully set forth herein.

57. The City Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

58. The City Entities breached that duty by failing to conduct a title search of the District 10, 15 and 17 properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of those Districts, and by failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

59. As a direct and proximate result of the City Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost of significant property interest in having his first purchase money mortgage purportedly subordinated by operation of law to the status of a junior lien, behind the District 10, 15, and 17 special assessment liens, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

COUNT V

Cause of Action Against The City Entities:
Illegal Use of Funds

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 29 as if fully set forth herein.

60. On Information and belief, the City Entities reimbursed DeSimone for expenses incurred in obtaining a Development of Regional Impact ("DRI") Development order, Resolution Nos. 88-28 and 90-46.

61. DeSimone requested that the City Entities establish special assessment districts to provide a means for financing public improvements on the property known as

Omni Interstate Park, which includes the Mortgaged Property.

62. The special assessment districts were implemented through the Resolutions for Districts 10, 15, and 17.

63. The City Entities agreed to reimburse and did reimburse DeSimone for the costs related to the public improvements including obtaining the DRI Development Order.

64. It is not necessary to obtain a DRI Development Order to provide the public improvements made pursuant to Districts 10, 15 and 17.

65. The infrastructure and public improvements made to Districts 10, 15 and 17 are not included in any statutory DRI category or threshold but are a necessary and fundamental component of all development projects.

66. Districts 10, 15 and 17 were created pursuant to Chapter 170, *Florida Statutes*. Special assessments for districts created under Chapter 170 may be levied only for the purposes enumerated in Section 170.01, *Florida Statutes*. These purposes do not include obtaining a DRI Development Order. Only costs necessary and incident to the improvements in the special assessment district may be reimbursed. Because the DRI Development Order is not necessary or incident to the improvements, it is not a reimbursable cost. The City Entities' reimbursement of DeSimone for these costs was illegal.

67. Article VII, Section X of the Florida Constitution prohibits the expenditure of public funds for a private purpose. Reimbursing costs which are not necessary or

incident to improvements made in a special assessment district, such as DRI costs, are a prohibited expenditure of public funds for a private purpose. The City Entities' reimbursement of DeSimone for these costs was illegal.

68. Special assessments constitute a peculiar form of taxation and are levied under the taxing power of the state which is limited by Article VII, Section I of the Florida Constitution which therefore limits the City Entities' powers of taxation in Districts 10, 15 and 17 to only those permissible taxes. The City Entities' taxing through Districts 10, 15 and 17 for the DRI costs were not within their permissible taxing powers and was illegal.

69. Because the City Entities reimbursed DeSimone for DRI expenses which are not necessary and incident to the District 10, 15 and 17 improvements, expended public funds for a private purpose and taxed outside their permissible taxing powers, the City Entities have illegally used special assessment funds which were obtained by assessing the Mortgaged Property and illegally taken Mr. Zipperer's property interest by purportedly subordinating those interests to a lien based on an illegal expenditure of funds.

WHEREFORE, Mr. Zipperer requests compensatory damages, the cost of this action and all other relief the Court deems just, necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by regular U.S. Mail to Jacqueline W. Hubbard, Esquire, City Attorney, P.O. Drawer 2217, Ft.

Myers, Florida 33902; Theodore L. Tripp, Jr., Esquire, Garvin & Tripp, P.O. Drawer 2040, Ft. Myers, Florida 33902; and John O. Terry, Esquire, Lee County Tax Collector, P.O. Box 850, Ft. Myers, Florida 33902-0850; and Robert A. Butterworth, Florida Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 7th day of December, 1994.

/s/ John H. Rains
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[Exhibits Omitted In Printing]